United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2287

DOCKET NO. 74-2287
(Related to Docket No. 74-2327)

ORIGINAL

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P/S

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

In the Matter of

HAROLD A. LIPTON and IRVING LEVIN,

Plaintiffs-Appellants,

-against-

ROBERT J. SCHMERTZ,

Defendant-Appellee.

On Appeal from the United States District Court

for the Southern District of New York

APPELLANTS' BRIEF

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MISCELLANEOUS

PRELIMINARY STATEMENT

This is an appeal from an Order of Hon. Constance Baker Motley, U.S.D.J., dated September 30, 1974:

(a) striking a registration effected in the U.S. District Court for the Southern District of New York of a judgment obtained in the U.S. District Court for the Central District of California, and

(b) denying appellants' (hereinafter referred to as "plaintiffs'") application for an order of attachment, dismissing plaintiffs' diversity action, in the nature of a suit on the said California judgment, and further permanently enjoining plaintiffs from attempting to enforce the California judgment, pending appeal thereof, except in the Federal Courts of California, where the said judgment has not been stayed.

STATEMENT OF FACTS

Plaintiffs obtained a judgment, after jury trial, against the appellee (hereinafter referred to as "defendant" or "SCHMERTZ,") in the United States District Court for the Central District of California ("California Judgment") in the amount of $4,221,047.57, entered July 25, 1974. (Vol. I, 4A).

The District Court set a supersedeas bond of $3,000,000.00 to stay execution. Defendant's several applications to post alternate security have been denied, and the appeal is pending without stay of execution (Exhibit C, Vol. I, 8A).

On September 11, 1974, plaintiffs registered the California judgment in the Southern District of New York under the Federal Registration Statute, 28 U.C.S. 1963 (Relevant Docket Entries, Vol. II, ii) and issued Information Subpoenas and Restraining Notices under CPLR 5222 (Vol. II, 10A)[1/]

[1/] On September 26, 1974, the Boston Globe reported that defendant Schmertz had "divested himself of two fledling francises, the Stars and the WHA Whalers". On the morning of September 30, 1974, plaintiffs also obtained in the Superior Court of the Commonwealth of Massachusetts in Boston orders enjoining defendant and the First National Bank of Boston from further disposing or alienating defendant's assets.

On September 24, 1974, defendant moved to strike the registration, which motion was referred to Judge Motley, who temporarily restrained further proceedings by plaintiffs on the said judgment, pending hearing thereon.

On September 25, 1974, plaintiffs filed a plenary diversity suit in the Southern District of New York based upon the California Judgment and applied for an order of attachment in connection therewith. (Vol. I, 36A). This matter was referred by Judge Carter to Judge Motley for disposition, in view of plaintiffs pending motion to strike the registration.

Late in the afternoon of September 30, 1974, after hearing argument on both matters,Judge Motley rendered a memorandum opinion (Vol. II, 12A) and signed the order appealed from herein. (Vol. II, 15A).

The memorandum opinion held, that since an appeal was pending, the California judgment was not "final", precluding registration; and secondly, that since registration was not possible, attachment and plenary suit on the said judgment was impermissible as it would

"manifestly defeat the objectives of Sec. 1963".

Judge Motley's resultant order not only struck the registration and denied the application for attachment, but also dismissed plaintiffs' plenary suit and permanently enjoined plaintiffs from enforcing their judgment throughout the world, except in California.

Plaintiffs contend:

(1) they are entitled to bring a plenary diversity suit on the judgment, and obtain an order of attachment in connection therewith, and

(2) plaintiffs should not be enjoined from enforcing their judgment elsewhere, since no stay has been granted on the California Judgment.

(3) Registration of the judgment under the circumstances of this case, was proper.

QUESTIONS PRESENTED

(1) Is registration of a Federal judgment under 28 U.S.C. 1963 the exclusive method for enforcement of a Federal judgment?

(2) Are plaintiffs entitled to bring a diversity

suit on their California judgment in the Southern District?

(3) Are plaintiffs entitled to an order of attachment under CPLR Rule 6201 (7)?

(4) Were plaintiffs properly enjoined from seeking to enforce their California Judgment outside of California, where no stay has been granted?

(5) Was registration of the California Judgment proper under the circumstances?

ARGUMENT

POINT ONE

REGISTRATION UNDER 28 U.S.C. 1963 IS NOT AN EXCLUSIVE REMEDY, AND TO HOLD OTHERWISE VIOLATES THE PRINCIPLES ENUNCIATED IN ERIE V. TOMPKINS

Judge Motley's opinion and order assumed that registration is an exclusive remedy and that a plenary suit is thereby precluded.

Thus, upon striking plaintiffs' registration, Judge Motley also dismissed plaintiffs' diversity suit (even though no motion to dismiss was before her), denied plaintiffs' motion for attachment, and

enjoined plaintiffs from seeking to enforce their California Judgment anywhere except in California.

This assumption of exclusivity is the critical error below, for if plaintiffs have non-exclusive and cumulative remedies, they should have been permitted to prosecute their plenary suit in the Southern District and in Boston, as well as elsewhere.

As recently as this year. Judge Pollack, a colleague of the District Court below, recognized the alternate remedies available in New York to a foreign judgment creditor in American Fidelity F. Ins. Co. vs. Paste-Ups Unlimited, Inc., 399 F. 2d 219, (SDNY 1974), stating:

> "New York provides three alternative methods for the enforcement of a sister state judgment. A judgment creditor holding a foreign judgment which is entitled to full faith and credit in New York may enforce his judgment (1) by bringing an action on the judgment (see New York CPLR Section 5406); (2) by moving for summary judgment in lieu of complaint under CPLR Section 3213, or (3) by proceeding under the registration provisions of Article 54 of the CPLR. The method utilized is optional with the judgment creditor. CPLR Section 5406. See Restatement (2nd) of Conflict of Laws 99, Comment (b) 1969.) Furthermore, a judgment creditor may also utilize the provisional remedy of attachment in New York in proceedings on his foreign judgment. New York CPLR §6201(7)."

The Uniform Enforcement of Foreign Judgments Act (CPLR Sec. 5401 et seq.), referred to by Judge Pollack, became effective in New York on September 1, 1970, over 20 years after 18 U.S.C. 1963 (1948).

Under CPLR Sec. 5401 "foreign judgment" means any judgment, decree or order of a court of the United States or of any other court which is entitled to full faith and credit in this state.

CPLR Sec. 5406 provides:

> "The right of a judgment creditor to proceed by an action on the judgment or a motion for summary judgment in lieu of complaint, instead of proceeding under this article, remains unimpaired."

Thus, a holder of a California District Court judgment has cumulative remedies in the state of New York and could sue on the judgment or move for summary judgment in lieu of complaint, as well as registering the judgment under the state procedure (Article 54).

Judge Motley's order however, not only denies plaintiffs the federal registration remedy under 28 U.S.C. 1963, but further prohibits and enjoins

plaintiffs from exercising their State remedies of registration, suit or summary judgment, the effects of which are discussed, infra.

Conversely, Judge Motley's order by its implication of exclusivity, would render Article 54 of the CPLR unconstitutional, in that it gives holders of federal judgments in the courts of the State of New York, rights preempted by Congress under 28 U.S.C. 1963.

These conclusions can be avoided by giving 28 U.S.C. 1963 its sensible and intended construction, that of providing a speedy alternative and cumulative remedy to suit on the judgment, including State registration under the U.E.F.A. (Article 54) or such other remedies as the States may provide.

POINT TWO

PLAINTIFFS HAVE A RIGHT TO INSTITUTE SUIT ON THE CALIFORNIA JUDGMENT

If 28 U.S.C. 1963 is not exclusive and does not preclude suit in the New York Courts under Article 54, plaintiffs should be permitted to bring such suit in the Southern District.

Such a plenary suit is an independent action requiring independent grounds of jurisdiction and proper venue. See, 2 Moore's Fed. Prac., Par. 1.04 (2), Note 7, citing Carson v Durham 121 U.S. 421 (1887).

Since there is a diversity of citizenship and the sum at issue obviously exceeds the jurisdictional amount, plaintiffs should be permitted to proceed with their diversity suit below.

Judge Motley was in error in dismissing such suit, and even if the motion for a writ of attachment was denied, the suit should not have been dismissed, since plaintiffs might be able to serve defendant personally in the district.

POINT THREE

PLAINTIFFS ARE ENTITLED TO AN ORDER OF ATTACHMENT UNDER CPLR SEC. 6201 (7).

CPLR Sec. 6201 (7) provides for attachment when:

> "The cause of action is based on a judgment, decree or order of a court of the United States or of any other court which is entitled to full faith and credit in this state, or on a judgment which qualifies for recognition under the provisions of article 53;..."

The statute thus expressly permits attachment, where suit is brought on a foreign judgment, regardless of whether defendant is a resident or engaged in fraudulent conduct.

POINT FOUR

JUDGE MOTLEY'S PERMANENT INJUNCTION IS AN ABUSE OF THE DISTRICT COURT'S POWER

The defendants have obtained from Judge Motley the very relief that has been thrice denied them in California. The effect of Judge Motley's injunction is to stay enforcement proceedings without a bond, in a situation where the defendant has been heretofore unable to secure a stay before the California District Court and the Court of Appeals for the 9th Circuit, unless he posted a $3,000,000.00 supersedeas bond.

Judge Motley's injunction is additionally egregious by its direct contravention of the provisions of 28 U.S.C. Sec. 2283, which provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

When Judge Motley decided that the registration was improper and ordered same to be stricken, there was no longer any judgment in effect in her District Court; thus, the further provisions of her order were not necessary in aid of its jurisdiction or to protect or effectuate its judgments. The result, however, was prejudicial to the plaintiffs who had commenced proceedings that morning, prior to the making of Judge Motley's order, in the Commonwealth of Massachussets, which the order appealed from purports to stay.

Moreover, Judge Motley's interpretation of 28 U.S.C. 1963 as an exclusive remedy can scarcely be deemed as "expressly authorized by Act of Congress." Cf. Atlantic Coast Line R. Co. v. Engineers 398 U.S. 281, 26 L. Ed. 2d 234, 90 S. Ct. 1739 (1970).

It is therefore patently clear, that the order appealed from is manifestly erroneous and should be vacated insofar as it restrains and enjoins the plaintiffs enforcing the judgment.

POINT FIVE

REGISTRATION OF THIS JUDGMENT UNDER THESE CIRCUMSTANCES WAS PROPER WITHIN THE MEANING AND INTENT OF 28 U.S.C. 1963

28 U.S.C. 1963, which became effective September 1, 1948, provides: "A judgment in an action for the recovery of money or property now or hereinafter entered in any District Court which has become final by appeal or expiration of time for appeal may be registered in any other District by filing therein a certified copy of such judgment. A judgment so registered shall have the same effect as a judgment of the District Court of the District where registered and may be enforced in like manner."2/

The courts which have discussed the purpose of 28 U.S.C. 1963 have generally declared, in effect, that it was the Congressional intent to provide a prompt, efficient and inexpensive method for the enforcement of federal judgments, which would be the substantial equivalent of a judgment of the

2/ 28 U.S.C. 2508 is a comparable, but not identical statute relative to a judgment in favor of the U.S. in the Court of Claims, which permits registration, and enforcement, notwithstanding, that the judgment is reviewable.

Court of Registration upon the original judgment and that registration is intended to achieve the same result as a suit upon the judgment. (Juneau Spruce Corp. v. International Longshoremen's & Warehousemen's Union, 128 FS.697 (1955, D.C. Hawaii).

In the absence of a statute providing for registration or summary enforcement of foreign money judgments it is usually necessary to bring an action on the foreign money judgment and to obtain a new judgment in the forum before an execution will issue. That procedure created particular difficulties for judgment creditors who had originally grounded federal jurisdiction based upon the existence of a federal question. Since a suit on a judgment does not involve a federal question, such judgment creditors lacking diversity could not enforce their judgments in other Federal Courts by commencing a new action thereon. In Stiller v. Hardman, 324 F.2d 626 (CA2-1963), the Court declared that 28 U.S.C. 1963 eliminates that jurisdictional problem and provides a speedier and more efficient mechanism for the enforcement of federal judgments (in accord, Stanford v. Utley, 341 F.2d 265 (CA-8-1965).

In Stiller, the Court was required to interpret the statute and concluded, that it was not a requisite to registration that the judgment be one for the recovery of money or property alone, or that it be a judgment which was rendered in an original suit seeking such recovery, or one awarded upon a complaint rather than a counter-claim. Thus, the Stiller Court permitted a patentee to register in two New York federal courts a judgment recovered against a corporation in a patent infringement suit in an Ohio federal court, and rejected the defense argument that 28 U.S.C. 1963 applied only where the original proceeding was an action for money or property, concluding that the statutory term "action" embraces legal proceedings instituted by way of counter-claim as well as through filing of a complaint and depends upon the nature of the judgment, rather than upon the form upon which the action is brought. (To the same effect, see Squeez-A-Purse Corp. v. Stiller, 31 FRD 261 (1962, D.C. N.Y.).

In Hanes Supply Co. v. Valley Evaporating Co., 261 F.2d 29 (CA-5-1958) that court stated, in discussion, that 28 U.S.C. 1963 is intended to provide all the benefits deriving from a local judgment on a "foreign" judgment, without subjecting either plaintiff or defendant to the expense of a second law suit.

Plaintiff submits that the provisions of the Uniform Enforcement of Foreign Judgments Act; N.Y. CPLR, 5018b; CPLR 5401 et seq.; CPLR 6201 et seq.; 28 U.S.C. 2508; FRCP 64; FRAP 7 & 8; the facts and special circumstances demonstrated herein, indicating that the judgment debtor is disposing of or transfering his assets to the resultant prejudice of the plaintiffs'; the inherent equity power of this court, require a logical interpretation of 28 U.S.C. 1963 consistent with the provisions of the aforesaid statutes. That such interpretation requires this court to conclude that 28 U.S.C. 1963 was intended to permit registration of this judgment which is otherwise enforceable in the district where rendered.

A) ABEGGLEN IS NOT AUTHORITATIVE AND ITS HOLDING IS ILLOGICAL CONSIDERING ITS RESULT WHICH FAILS TO GIVE EQUAL PROTECTION OF THE LAW

The judgment debtor relies upon the authority of Abegglen v. Burnham, 94 F.S. 484 (D.C. Utah 1950) the only direct holding by any federal court which purported to interpret the intent and meaning of the words "final by appeal". In that proceeding, the judgment debtor took an appeal to the Circuit Court of Appeals for the 9th Circuit, without filing a supersedeas bond. The District Judge rejected the arguments of the plaintiff that "final by appeal" means that the judgment is final in the sense that it may be appealed from; that since execution might issue in the district where the judgment was entered pending appeal, unless a supersedeas bond is posted, Congress intended that such judgment might be registered in another district and an execution issue during the pendency of appeal.

It is apparent that no consideration was given by the Abegglen court in its decision to the effect

and consequences of the Uniform Enforcement of Foreign Judgments Act, which was not in effect in the State of Utah in 1950 when the decision was rendered. Moreover, no consideration was given by the court to the plaintiffs' remedy to commence a suit upon the judgment in the court, nor the interplay and effect of other statutes.

Although the question apparently has not been directly presented and ruled upon, a few decisions support the view that the registration procedure authorized by 28 U.S.C. 1963 is not an exclusive remedy, and that the judgment creditor may, in an appropriate case, bring suit upon the judgment in another district. In Juneau Spruce Corp. v. International Longshoremen's & Warehousemen's Union, supra, the court stated in discussion that the judgment creditor's remedies are cumulative, and that he can sue upon the judgment in the second jurisdiction in an independent action, as well as register it there. (See, Slade v. Dickinson, 82 F.S. 416 (D.C. Mich. 1949) which appears to support this view by implication).

Moreover, the Abegglen court did not apparently rule on whether the defendant's failure to post a supersedeas bond constituted a waiver or estoppel, nor as in the context of the instant case, the effect of the rulings made by the District and Circuit Courts in having denied the defendant's application for a stay of the judgment pending appeal, all of which will be hereinafter discussed.

B) OTHER CASES CITED BY DEFENDANT ARE NON-SUPPORTIVE

While it is true that Stanford v. Utley, 341 F.2d 265 (CA-8 1965) cited the Abegglen case (Page 271), the citation was not necessary to support the court's holding. In Stanford, the Mississippi court judgment was registered in Missouri the day following its entry in Mississippi. The court in order to avoid any conflict concluded, that because the defendants did not have any objection to the plaintiff's securing a judgment, the situation fell "within the rule that a person who has consented to the entry of a judgment, unless the matter is one of jurisdiction, has no status to appeal." (Id, Page 271).

More persuasive however is the court's observation

> "If registration is to 'have the same effect as a judgment', it must, for our present enforcement purposes, mean just that and not something else. To restrict registration to a procedural and collection device for the foreign judgment itself, and to have it expire with the foreign judgment, would give the words of the statute a lesser status than their plain meaning and to make registration something far inferior to a judgment on a judgment" (Id, Page 270).

The Stanford court in construing 28 U.S.C. 1963 held

> "In other words, for the present fact situation and for enforcement purposes, the Missouri federal registration equated with a new Missouri federal judgment, that is, it is no different than a judgment timely obtained by an action in the Missouri federal court on that Mississippi judgment" (Id, Page 268).

From a reading of the Stanford case it is evident that the court in its exhaustive examination of the applicable statute in no way relied upon the precedent, if any, of Abegglen since it completely avoided a confrontation of the issue, as hereinabove set forth, and went on to leave open many questions including, "Is Section 1963 the equivalent of the Uniform Enforcement of Foreign Judgments Act, even though the latter is much more detailed in its provisions?" (Id, Page 271).

Ohio Hoist Manufacturing Co. v. LiRocchi, 490 F.2d 105 (CA-6 1974), appeal dismissed under Rule 60, -- U.S. -- (Ju[illegible] 4, 1974), also cited by the defendant is distinguishable and inapplicable. The question there presented was the collateral issue of pendent jurisdiction in a situation where LiRocchi had obtained a money judgment against Ohio Hoist in the Central District of California and execution of that judgment was stayed upon the filing of a motion for a new trial. LiRocchi, nevertheless presented it to an Ohio court for registration without revealing that execution of the California judgment had been stayed pending the motion for a new trial. The court found that the registration in Ohio of the California judgment was an egregious violation of the terms of the statute. This was because not only had a motion for a new trial been filed in California after the judgment was rendered, but, in addition, the enforcement of the judgment had actually been stayed by the California court. Moreover, the execution issued thereon apparently seriously interfered with the conduct of judgment debtor's

business. As an appendix to the Ohio Hoist case is a history of the statute. Interesting is the note of the Advisory Committee on proposed Rule 77, which formed the basis of this statute and which compared it to judgments for registration in the Court of Claims, now 28 U.S.C. 2508, (see footnote 1, supra).

Olympic Insurance Company v. H. D. Harrison, Inc., 413 F.2d 973 (CA-5 1969) also cited by the defendant is equally non-illuminating. The court in dismissing an appeal and rendering a decision on a motion for re-hearing parenthetically alluded to the Abegglen case. What is interesting, however, is the Circuit Court's observation that the plaintiff "probably" could not execute its substantial judgment outside the District of Louisiana. The court's reference was not, however, a necessary ingredient of its holding and can only be viewed as dicta.

C) IMPACT OF UNIFORM ENFORCEMENT OF FOREIGN JUDGMENT ACT

Effective September 1, 1970, the State of New York added a new Article 54 to the CPLR concerning the enforcement of foreign judgments entitled to full

faith and credit. It thereby incorporated into the law of the State of New York the major features of the 1964 Uniform Enforcement of Foreign Judgments Act. The term "foreign judgment" and "American judgment" as used in the Act are identical in meaning and include judgments of courts of States of the United States and courts in the federal jurisdiction; they do not include judgments of courts of foreign countries.

As appears from the 13th Annual Report of the Judicial Conference (1958) Article 54

> "would provide a registration procedure for the enforcement of American judgments. This procedure is similar to that used in the federal district courts for the registration of foreign judgments for money or property (28 U.S.C. 1963) and is based upon the 1964 Uniform Enforcement of Foreign Judgments Act.
>
> ****
>
> "Article 54 is designed to provide for American judgments, aside from default and consent judgments, which are sought to be enforced in New York, the simplier, speedier and less expensive method of enforcement which is now available in the federal system for the enforcement of judgments of the United States District Courts."

Article 54 of the CPLR provides that a:

> " 'foreign judgment' means any judgment, decree of order of a court of the United States or of any other court which is entitled to full faith and credit in this state, except one obtained by default in appearance, or by confession of judgment." (CPLR 5401).

CPLR 5402 further provides:

> "A copy of any foreign judgment authenticated in accordance with an act of congress or the statutes of this state may be filed within 90 days of the date of authentication in the office of any county clerk of the state. The judgment creditor shall file with the judgment an affidavit stating that the judgment was not obtained by default in appearance or by confession of judgment, that it is unsatisfied in whole or in part, the amount remaining unpaid, and that its enforcement has not been stayed, and setting forth the name and last known address of the judgment creditor."

It is important to note that this statute does not require that the judgment <u>be final by appeal or expiration</u> of time for appeal, but merely requires that the enforcement of the judgment has not been stayed.

Moreover, CPLR Section 5404 vests in the State Court discretion to stay the enforcement of the non-final foreign judgment upon proof that the judgment

debtor has furnished security for the satisfaction of the judgment required by the State in which it was rendered. The court based on other grounds could also stay enforcement, but only upon requiring the same security for satisfaction of the judgment which is required in this state, which under CPLR 5519 is an undertaking in the amount of the money judgment.

CPLR Section 5406 preserves to the judgment creditor the right to proceed by an action on the judgment or a motion for summary judgment in lieu of complaint, which rights are specifically re-affirmed and statutorily specified to remain unimpaired.

D) TO FOLLOW THE ABEGGLEN HOLDING RESULTS IN ANOMOLIES

Abegglen's result, for example, would have a federal district judgment, otherwise final except under appeal, where no stay of enforcement has been entered, registerable in the courts of the State of New York; yet the same federal judgment could not be registered in a federal court of the State of New York notwithstanding that it could be registered and enforced in the state court. This result merely

affords a judgment creditor the ability to forum shop, a practice condemned as early as 1938 by the United States Supreme Court in Erie v. Tompkins, 304 U.S. 64 (1938).

Its result serves to divest the federal court of responsibility and authority to oversee and enforce its own judgments. It prejudices the rights of judgment debtors who could litigate the substantive validity of same, utilizing FRCP 60 and the resultant case law developing thereunder as evidenced by recent trend of decisions in this Court and Circuit. (Coleman v. Patterson 57 FRD 146 (S.D.N.Y. 1972); Tommills Brokerage Co. Inc. v. Thon, 52 FRD 200 (P.R. 1971); Whitehouse v. Rosenbluth Bros., 32 FRD 247 (E.D. pa. 1962); Hadden v. Rumsey Products, Inc., 196 F.2d 92 (CA2,1952): Moser Steel Co. v. Fluor, 436 F.2d 383 (CA2, 1970) cert. den. 402 U.S. 1945 (1971).

This abdication is not warranted and can be avoided by interpreting the registration act as urged by the plaintiffs-judgment creditors herein.

A further anomoly is evident from a decision of this Circuit Court, in Knapp v. McFarland, 462

F.2d 935 (CA2, 1972) wherein Judge Mansfield, opining for the court, found that the district court judgment below, the enforcement of which had not been stayed by the filing of a supersedeas bond, was validly filed in the New York State Courts pursuant to CPLR 5018 (b) and that execution issued thereon was valid and otherwise enforceable. As Judge Mansfield pointed out

> "...our function is to give effect to the legislature's intent, and where a literal reading leads to an illogical result, the tempering influences of reasonable construction must be applied. 'There is no surer way to misread any document than to read it literally.' Guiseppi v. Walling, 144 F. 2d 608, 624 (2d Cir. 1944. (per Learned Hand, C.J.)." (at Page 939).

The result urged by the defendants would leave the enforcement of judgments to the fortuitous circumstance of state law or the place where property of the judgment debtor is located, and as far as this federal district is concerned result in an uneven application of the laws, a result not generally favored by our constitutional prohibitions.

POINT SIX

EFFECT OF JUDGMENT DEBTOR'S FAILURE TO FILE SUPERSEDEAS BOND AND DENIAL OF ITS APPLICATION FOR A STAY OF ENFORCEMENT PENDING APPEAL

It is apparent that in order to avoid direct confrontation with the literal wording of 28 U.S.C. 1963 the courts have been constrained to assert waiver or estoppel against the complaining judgment debtor.

In Hadden v. Rumsey Products, supra at footnote 4, the court considered, but found it unnecessary to determine, whether the waiver in the notes of "all rights of appeal" accelerated the time for registration under 28 U.S.C. 1963. In Stanford v. Utley, supra, the court upheld the validity of registration one day after original rendition, by finding consent based upon a letter written by defendant's attorney.

It is submitted that the judgment debtor's acts in the circumstances of the instant controversy warrant this court in applying the doctrine of waiver or estoppel. The judgment debtor has not filed a supersedeas bond. The judgment debtor's application to stay enforcement pending appeal has been denied

three times. The judgment debtor has not complied with FRAP 7 and 8. The judgment debtor by his own admission, and as further demonstrated by newspaper articles, is in the process of transferring or has already disposed of assets within and without this district. The judgment debtor is subject to execution within the State of California, but claims prejudice if execution issues in New York. Actually, it is the plaintiffs who are prejudiced because the defendant's assets are not in California. The plaintiffs have not issued execution, but have merely resorted to the issuance of restraining notices, the effect of which is to maintain the status quo and prevent the judgment debtor from his demonstrated proclivity at transferring or otherwise disposing of assets pending appeal, with its obvious resultant prejudice to them.

Rendering the registration invalid would relegate the plaintiffs to the useless formality and necessity of registering the judgment in the State Courts of the State of New York, with the same result; or commencing an action on the judgment with writ of attachment, as they have been obliged to so do in the court below, again with the same result.

POINT SEVEN

THE RIGHT OF PLAINTIFFS TO COMMENCE AN ACTION ON THE JUDGMENT AND ATTACH

When the legislature of the State of New York enacted Article 54 into law, it simultaneously therewith amended CPLR 6201 by inserting therein a new subdivision 7, to make attachment available in any case where the cause of action is based on a judgment, decree or order of a court of the United States or of any other court which is entitled to full faith and credit in the state. As set forth in the legislative reports (McKinney's Session Laws, 1970, Page 2787) the proposed amendment enables a plaintiff suing on a judgment rendered in a sister state, federal District Court or foreign country to take advantage of the jurisdictional as well as the security purpose of an attachment even though the defendant is a resident of the State and none of the other qualifying circumstances specified in CPLR 6201 are present. The availability of an attachment levy before service of the summons, together with summary judgment procedures now available, would thus secure of the judgment creditor most of the

advantages of the 1948 version of the Uniform Enforcement of Foreign Judgment Act then presently in effect in six states, without a major change of the existing statutory law.

Professor McLaughlin in commenting on the aforesaid amendment to the CPLR in 22 Syracuse L.R. 57-58 (1970-71) noted that the UEFJA and the federal statute dispensed with the useless formality of commencing a new action by permitting a judgment creditor to convert his foreign judgment into a local one simply by registering it. Further, the new New York registration procedure is optional so that if the judgment creditor prefers to sue on the judgment, as of old, he may do so. Indeed, the old procedure has been improved since attachment is now available in an action on a judgment.

All of the commentators (see Professor Peter E. Herzog, 22 Syracuse L.R. (1970-71) 368) have noted that the UEFJA provides a registration procedure, somewhat analogous to that used in the United States District Courts.

The UEFJA permits the registration of judgments subject to appeal, but enforcement proceedings can be stayed in such case.

As noted by Professor Herzog (Note 39, Page 371)

> "It should be noted that provisional attachment of the judgment debtor's assets (pending the proceedings for enforcement of the foreign judgment) is available even if the judgment debtor is not guilty of fraud, over-reaching or other types of misconduct which are sometimes necessary for an attachment. The attachment can thus be used to prevent the judgment debtor from withdrawing his assets from New York before enforcement of the foreign judgment is completed, and also to secure quasi in rem jurisdiction where no basis for any in personam jurisdiction is present." (Emphasis Supplied)

POINT EIGHT

FRCP 64 AND LOCAL CIVIL RULE 15

FRCP Rule 64 provides that:

> "At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the District Court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; ... the remedies thus available include arrest, attachment, ...

> and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by independent action."

From the preceding, it is axiomatic that the judgment creditors herein, notwithstanding the validity or non-validity of the registration of the California judgment in this District, have the right to commence an action on a judgment and proceed by writ of attachment as provided in CPLR Article 62 in this Court.

Notwithstanding the ultimate decision to be made by this court as to the validity or non-validity of the California registration, the court must grant the judgment creditors' application for cross-relief for a writ of attachment in the action commenced by them on the judgment which action was filed September 25, 1974, 74 C 4211. The amount in controversy exceeds $10,000.00 and the litigants are citizens of different states (28 U.S.C. 1332).

The attention of this court is directed to SDNY Local Civil Rule 15, "Procedure in Absence of Rule," which directs and provides as follows:

"Whenever a procedural question arises which is not covered by the provisions of any statute of the United States, or of the Rules of the United States District Courts for the Eastern and Southern Districts of New York, it shall be determined, if possible, by the parallels or analogies furnished by such statutes and rules. If, however, no such parallels or analogies exist, then the procedure heretofore prevailing in courts of equity of the United States shall be applied, or in default thereof, in the discretion of the court, the procedure which shall then prevail in the Supreme Court or the Surrogate Court as the case may be of the State of New York may be applied."

The plaintiffs urge that the aforesaid Rule requires this Court to confirm the validity of the registration of this judgment under the special circumstances attendant herein so as to harmonize same with the procedural statutes of the State of New York and make it parallel and analogous thereto.

CONCLUSION

For all of the reasons and special circumstances set forth herein the Court must find as follows:

1) That the registration of the California judgment under appeal, where no stay of execution or supersedeas bond has been filed, is valid;

2) The order of Judge Motley should be reversed and remanded with direction to reinstate plaintiffs' plenary suit and to issue an order of attachment.

Dated: New York, New York
October 15, 1974

Respectfully submitted,

ROBERT P. HERZOG

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